80-1913

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Monongahela Power Company,
Petitioner,

v

United States of America

and

Interstate Commerce Commission,
Respondents,

and

The Baltimore and Ohio Railroad Company,
Intervening Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Interstate Commerce Commission acted arbitrarily, capriciously and without record support when it determined that the existence of an average agreement between Monongahela Power Company and the Baltimore and Ohio Railroad Company precluded reparation of the penalty portion of demurrage charges.

LIST OF THE PARTIES

Petitioner Monongahela Power Company (Monongahela or the Company) is a public utility incorporated under the laws of the State of Ohio and serving customers in northern West Virginia. It is a wholly-owned subsidiary of the Allegheny Power System, Inc., and is affiliated with the other subsidiaries of the Allegheny Power System, viz Allegheny Power Service Corporation, West Penn Power Company, The Potomac Edison Company, Allegheny Pittsburgh Coal Company, West Virginia Power and Transmission Company, West Penn West Virginia Water Power Company and Beech Bottom Power Company, Inc.

Respondents in the proceedings below were the Interstate Commerce Commission (ICC) and the United States, and the Baltimore and Ohio Railroad Company (B & O) intervened as a respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petioner Monongahela Power Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 13, 1981.

OPINION BELOW

The opinion of the court of appeals (App. A. *infra)* is reported at 640 F2d 504.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 13, 1981 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§1254(1) and 2350(a).

STATUTES INVOLVED

Three sections of the Interstate Commerce Act, 49 U.S.C. §10101 *et seq.*, are relevant to this petition[1], as is one section of the Administrative Procedure Act, 5 U.S.C. §500, *et seq.* These provisions are set forth below:

> 49 U.S.C. §10701(a) [Section 1(5) (b)]: A rate, classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdication of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. A through route established by such a carrier must be reasonable. Divisions of joint rates by those carriers must be made without unreasonable discrimination against a participating carrier and must be reasonable.
>
> 49 U.S.C. §10750 [Section 1(6)]: A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title shall compute demurrage charges, and establish rules

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[1]In 1978, Congress recodified the provisions of the Interstate Commerce Act. See Act of October 13, 1978, Pub. L. 95-473, 92 Stat. 1371. No substantive change in the law was effected by the recodification. In reproducing the relevant statutory provisions, petitioner has bracketed their former citation in the United States Code for the convenience of the Court.

related to those charges, in a way that fulfills the national needs related to —

(1) freight car use and distribution; and

(2) maintenance of an adequate supply of freight cars to be available for transportation of property.

49 U.S.C. §11701(b) [Section 13 (1)]: A person, including a governmental authority, may file with the Commission a complaint about a violation of this subtitle by a carrier providing, or broker for, transportation or service subject to the jurisdiction of the Commission under this subtitle. The complaint must state the facts that are the subject of the violation and, if it is against a water carrier, must be made under oath. The Commission may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Commission may not dismiss a complaint made against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title because of the absence of direct damage to the complainant.

5 U.S.C. §706: To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of an agency action. The reviewing court shall —

• • •

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

STATEMENT OF THE CASE

Tariffs governing the shipment of commodities by rail provide a certain amount of time, called free time, for unloading of rail cars after delivery to the recipient. The free time is expected to be sufficient, under normal circumstances, for the commodity to be unloaded and the empty car to be released to the railroad. If a consignee retains a rail car beyond the free time, he incurs demurrage charges, also provided for in rail tariffs, which consist of two components — a compensatory component and a penalty component.

The purpose of the compensatory component is to make the railroad whole for its loss of the use of the car during the period of excess detention. Monongahela has never challenged the right of the B & O to keep the compensatory portion of the demurrage charges in question.

The purpose of the penalty component is to penalize the shipper for undue detention of the car, thus encouraging him to unload and release the car without unnecessary delay. The penalty component of the demurrage charge is not a fine paid to the government, but is collected, along with the compensatory component, by the railroad, for which it is in the nature of a windfall.

Because penalty demurrage is aimed at "undue" or "unnecessary" detention, the ICC frequently awards relief from, or reparation of, the penalty component of demurrage charges where the shipper incurring the charges was not the "proximate cause" of the detention, and exercised "due diligence" in avoiding or abating it. *Prince Manufacturing Co. v. Norfolk & Western Ry. Co.*, 356 I.C.C. 702, 705 (1978).[2] It

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[2]See also *Ormet Corp. v. Illinois Central R. Co.*, 341 I.C.C. 647 (1972), where the Commission explained the controlling principle as follows:

> Where the consignee exercised due diligence and the proximate cause of the detention was attributable to neither the shipper nor the carrier, the penalty portion of the charge has been remitted because it was futile as a

was to obtain such relief that Monongahela initiated the proceedings before the ICC.

On March 23, 1979, Monongahela filed its Verified Complaint seeking reparation of the penalty portion of $970,940.00 in demurrage charges paid to the B&O for detention of loaded coal cars at the Company's Harrison Power Station during the winter of 1977-78. The ICC set the matter for handling under the modified procedure, which calls for submission of evidence and arguments in writing for consideration by an Administrative Law Judge, but no oral hearing.

Monongahela explained that it was not the proximate cause of the detention. The delay in unloading was due to the fact that the coal had frozen solid in the rail cars as a result of abnormally cold winter weather and disruptions in coal supply arrangements caused by the United Mine Workers strike, which was accompanied by violent picketing at the Harrison Power Station. The Company also showed that it had excercised due diligence in avoiding or abating the detention, having installed expensive heating and lump-breaking equipment to deal with the frozen coal problem, and having hired extra personnel and worked its people overtime to help with the unloading.

The B&O challenged Monongahela's showing on the proximate cause and due diligence issues, and also introduced a new issue which is the subject of this petition. The B&O pointed out that there was an "average agreement" in force between Monongahela and the B&O — an agreement under which Monongahela could earn "credits" for early unloading of rail cars which could be used to offset some "debits" (charges) incurred when other cars were detained past the free time. The B&O argued that the existence of such an agreement precludes the relief that would otherwise be

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deterrent against excessive demurrage. Obviously, railroads should not be permitted to make sizeable profits at the expense of a shipper who is powerless to act. (341 I.C.C. at 651, citations omitted.)

available when the proximate cause and due diligence tests are met.

In his initial decision (App. C, *infra*), Administrative Law Judge McMenamin found for Monongahela, and awarded the reparations sought by the Company in its complaint. The Judge noted that the Company had expended over $1.75 million on equipment and extra manpower to deal with the problem (App. C., p. A-19), that it had nothing to gain from the unloading delays (App. C, p. A-22), and that, as a public utility providing electricity to its customers in one of the coldest winters on record, Monongahela was compelled to maintain operations and "was powerless to avoid the detention." (App. C, p. A-23).

The B&O appealed the Judge's decision to Review Board 4, an employee board to which the Commission has delegated its initial review authority. Review Board 4 did not consider Judge McMenamin's finding that the detention had not been proximately caused by Monongahela, and that Monongahela had exercised due diligence, thus becoming eligible for relief from the penalty demurrage. Instead, Review Board 4, in reversing the Judge's decision, relied entirely on the existence of the average agreement.

Since Review Board 4's decision (App. B, *infra*) was a final order under the Commission's regulations, Monongahela sought review in the United States Court of Appeals for the 4th Circuit. Monongahela also sought review by the Commission itself, arguing that the Review Board's decision stemmed from a misreading of the applicable tariffs, was without support in the record, and was contrary to law and Commission precedent. The Commission did not reach the merits of Monongahela's position, but denied review on the ground that the average agreement issue was not an "issue of general transportation importance" warranting Commission review.

In its decision entered February 13, 1981, the Court of Appeals affirmed the decision of Review Board 4, in *Monongahela Power Co. v. ICC*, 640 F.2d 504 (4th Cir. 1981).

BASIS FOR FEDERAL JURISDICTION BELOW

The ICC had jurisdiction over the proceedings before it pursuant to 49 USC §11701(b), reprinted above at p. 3. The Court of Appeals had jurisdiction over Monongahela's appeal pursuant to 28 USC §§2321(a) and 2342(5).

REASONS FOR GRANTING THE PETITION

An Important Question of Federal Law Is Presented

Notwithstanding the ICC's refusal to grant discretionary administrative review of the decision by Review Board 4, this case presents an important question of federal law which has not been, but should be, settled by this Court.

In the *Prince Manufacturing Co.* case, *supra*, the Commission explained its policy with respect to relief from the penalty component of demurrage charges provided for by tariff. The Commission stated:

> [W]hen demurrage charges penalize a shipper who is powerless to avoid or abate the detention of cars because of circumstances beyond its control, they do not accomplish their purpose. Therefore, penalty charges have been found unreasonable and remitted upon a showing by the shipper (or consignee) that it was not the proximate cause of the detention and that it exercised due diligence in releasing or attempting to release the railroad equipment (356 I.C.C. at 705.)

Though the *Prince* case contains no limitation on this policy, Review Board 4's decision below establishes that the policy is inapplicable where there is an average agreement. The existence of such an agreement was held to be an absolute bar to relief, regardless of whether the proximate cause and due diligence tests were met. (App. B, p. A-10).

The Commission's position on the average agreement thus amounts to a ruling that the penalty component of demurrage charges — that component which constitutes a windfall to the railroads — is *per se* reasonable even when applied to a completely blameless shipper who was in no way responsible for the detention and who did everything possible to minimize it, so long as there is an average agreement in effect.

The Court of Appeals is therefore mistaken when it says (App. A, p. A-7): "We do not suggest, of course, that the mere existence of the average agreement foreclosed any other outcome. Presumably the power of the ICC to excuse payment of charges for justifiable reasons was still paramount." In fact, the Commission's refusal even to consider the factors of causation and diligence means that there can be no justifiable reasons for relief.

As will be seen, the rationales provided by the Commision and court below for such a position cannot withstand scrutiny, but of even greater significance is the fact that the Commission's indifference to the facts and circumstances underlying cases involving average agreement shippers will produce unreasonable and oppressive results. The case below involving Monongahela is an example of such an outcome. The Commission's refusal to grant relief from penalty demurrage served no purpose other than to provide windfall profits for the B&O.

In *Baca v. Commissioner*, 326 F.2d 189, 191 (5th Cir. 1964), the court noted that "the law does not lightly impose penalties and courts look with disfavor on forfeitures." The Commission's own decision in *Chronicle Publishing Co. v. Great Northern Ry. Co.*, 243 I.C.C. 279 (1941) is also instructive here. The Commission pointed out that:

> A large portion of the demurrage charge is in the nature of a penalty to force the prompt release of railroad equipment. Ordinarily any charge in the nature of a penalty would not be countenanced under the requirements of the law that all charges be reasonable. (243 I.C.C. at 281)

Demurrage charges have been sustained as a means of promoting efficient use of cars by providing a deterrent against undue detention, but the Commission and the courts have, in the past, been careful to limit their use to situations in which the increased charges actually promote this objective.

In *Chronicle Publishing Co., supra,* the Commission, noting that there was no car shortage — a strike had left large numbers of rail cars idle[3] — found that the purpose of penalty demurrage would not be served by denying relief to complainant. In *Iverson v. United States,* 63 F. Supp. 1001 (D.D.C. 1946), *aff'd* 327 U.S. 767 (1946), one of the leading cases on demurrage, the court sustained graduated demurrage charges, which it described as "part compensation and part penalty," but refused to permit them to be collected for periods during which the cars could not have been unloaded:

> Plaintiffs averred that it would have been impossible to unload cars on certain days during the Christmas holidays. The labor situation in that respect was of such common knowledge that we took judicial notice of it in passing upon the application for a temporary restraining order. In passing upon the motions to dismiss and the cross motions for summary judgment, the averments of the complaint must be accepted as facts. Upon that premise it appears that the orders could not, in respect to those days, accomplish any part of their sole objective, i.e., the unloading of cars. Their only result, so far as those cars are concerned, would be to cause payments to be made to the railroads by shippers. We think that emergency orders with that sole result are arbitrary. 63 F. Supp. at 1006.

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[3]The UMW strike in the winter of 1977-1978 had produced a similar situation with respect to the coal cars detained by Monongahela.

In deciding whether or not to grant relief from penalty demurrage, the Commission must balance the national interest in minimizing preventable detention of rail cars against the right of individual shippers to be protected from the imposition of severe penalties which they were powerless to avoid. As this Court said in *United States v. Allegheny - Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972): "[A]n agency's authority to proceed in a complex area such as car service by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances." The exemption procedures developed by the ICC to deal with special circumstances in the area of demurrage are the proximate cause and due diligence tests.

The two goals which should be fostered by the Commission's demurrage policies are not necessarily mutually exclusive, and the proximate cause and due diligence tests constitute an effective mechanism for distinguishing between penalty demurrage that promotes efficient car utilization, and penalty demurrage which merely enriches the railroads. The Commission's unwillingness to distinguish between the former and the latter where there is an average agreement does not represent a tilt in favor of efficient car utilization. Rather, it represents a rejection of the whole concept of a balance between two desirable goals, in favor of a rigid rule that serves neither.

Average agreement shippers may be penalized even if they were not responsible for the detention and were powerless to reduce it. The injustice of the penalty under these circumstances is simply ignored by the Commission. They may be penalized even though, since they were powerless to do more, the penalty does nothing to free more cars for use in common carriage. The futility of the penalty under these circumstances is also ignored.

Moreover, this unreasonableness is compounded by the fact that the rule is completely unnecessary. The proximate cause and due diligence tests enable the Commission to

provide relief where the penalty would be unjust, and withhold relief where the penalty promotes the transportation policies underlying demurrage.

The consequences of the Commission's position are of widespread interest to shippers who may be exposed, through no fault of their own, to high demurrage charges. There are at least three other shippers which were denied relief by the ICC under circumstances similar to those faced by Monongahela, which are currently challenging the Commission's position before Courts of Appeals. The issue before this court is a substantial one.[4]

The Court of Appeals Departed from the Accepted Course of Judicial Proceedings

In affirming Review Board 4's decision, the Court of Appeals violated two major precepts of judicial review of administrative agency actions. It relied on a rationale that is not set forth in the agency's decision, and it gave undue deference to agency expertise, affirming a decision which has no rational basis.

It is well settled that if agency action is to be sustained on judicial review, it must be sustained on the basis relied on by the agency itself in its decision. The Court of Appeals for the 4th Circuit recognized this principle in *E.I. du Pont de Nemours v. Train*, 541 F.2d 1018, 1026 (4th Cir. 1976), *rev'd in part on other grounds*, 430 U.S. 112 (1977). In affirming the decision of Review Board 4, however, the Court of Appeals relied on the *post-hoc* rationalizations of counsel rather than on the stated rationale of the ICC.

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[4]The average agreement issue is before the United States Courts of Appeals for the 3d, 6th and 7th Circuits in *Empire-Detroit Steel Div. v. ICC*, No. 80-2790, *Cleveland Electric Illuminating Co. v. ICC*, Consolidated Cases No. 80-3727, 80-3792 and 80-3793, and *Central Illinois Public Service Co. v. ICC*, No. 80-2006, respectively.

Review Board 4 found that weather interference, frozen ladings and car bunching[5] "are provided for in the contract, and may not be subsequently raised again to excuse the accrual of excessive detention time" (App. B, p. A-10). In fact, the applicable tariff does bar relief from penalty demurrage charges incurred pursuant to an average agreement where such charges were due to weather interference or car bunching.

However, there is no similar bar to relief in the average agreement itself or in the tariff, as to demurrage due to frozen ladings. As to such demurrage charges, average agreement shippers have conceded none of the rights to relief available to other shippers, and should be judged, like other shippers, in accordance with the proximate cause and due diligence tests. Review Board 4 misconstrued the tariff in order to treat demurrage due to frozen ladings like demurrage due to weather interference or car bunching, and denied relief.

The Court of Appeal's affirmance, in contrast, rested on a different basis. The court's assessment of the Commission's rationale was as follows:

> The ICC determined that its policy of excusing shippers from demurrage penalties where freedom from fault could be shown had not been, and should not be, applied where the parties, by the terms of the average agreement, had otherwise provided for a credit system for minimizing

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[5]Weather interference was defined in the applicable tariff as weather conditions threatening serious injury to the freight. As so defined, weather interference was not a factor here. Car bunching means the delivery, at the same time, of more cars than were ordered, causing unloading delays. Car bunching was also not involved here. Frozen ladings, i.e., solidly frozen coal hindering unloading efforts, were found by the Administrative Law Judge to have been the proximate cause of car detention by Monongahela (App. C, p. A-22), and the finding was not disturbed by Review Board 4.

> demurrage by assigning values to the shipper's favor in case of early release of freight cars. (App. A, p. A-4)

This rationale — that average agreement shippers, in signing agreements which give them a limited right to offset debits with credits, thereby give up any right to look to the Commission for further relief in extraordinary circumstances — was never enunciated by Review Board 4. However, even if it had been, the Court of Appeals' affirmance could not stand. This rationale comes no closer to satisfying the arbitrary and capricious test of the Administrative Procedure Act[6] than Review Board 4's stated rationale, which relies on a misreading of the average agreement and tariff.

In the first place, the court overlooks the fact that the *quid pro quo* for the average agreement is set forth in the tariff itself. As has been seen, the railroad allows the shipper to earn credits with which it can offset some debits, and the shipper forgoes adjustments for demurrage charges due to weather interference and car bunching.

Since the average agreement and tariff were drafted by the railroad, and the agreement is available to shippers on a take-it-or-leave-it basis, an interpretation of the agreement which introduces shipper concessions in addition to those expressly set forth therein is highly improper.

In the second place, the theory that average agreement shippers should not get relief from the Commission, even in extraordinary circumstances, because other relief in the form of credits is putatively available, does nothing to cure the inherent unreasonableness of rule which punishes helpless shippers without serving to lessen car detention in the slightest degree.

The case below illustrates the unreasonableness of the rule. Appendix D is page 39 from the Joint Appendix filed

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[6]5USC §706(2)(A).

with the Court of Appeals.[7] It contains a table showing the distribution of the demurrage charges incurred by Monongahela, and the information set forth therein was not disputed. As that table indicates, the vast bulk of demurrage charges incurred by Monongahela were attributable to detention days on which the charges were $20 per day and $30 per day.[8] Average agreement shippers are entitled to offset demurrage debits representing $10 per day charges with earned credits, if any, but $20 per day and $30 per day charges *cannot be offset.*

Assume Monongahela had been able to earn enough credits to offset every $10 debit it incurred, i.e., $74,880 in credits (an assumption which is highly doubtful, given the events of the winter). The charges Monongahela could not offset — the charges for which, under the Court of Appeals' analysis, no relief would be available — would still outrun those that could be offset by a factor of 12, or by some $900,000.[9]

Even if the court's theory of bargained-for alternative relief could be accepted, there will be times when the bargain fails utterly to achieve the purpose. This would be such a time. Such circumstances should be considered by the ICC when it considers the reasonableness of the penalty suffered by a shipper, regardless of whether there is an average agreement in force or not.

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[7]That page comes in turn from page 2 of the Verified Statement of Monongahela's comptroller in the Opening Statement of Facts and Arguments filed by the Company with the ICC.

[8]The applicable tariff provides for demurrage charges of $10 per day for each of the first four days a car is detained past the free time, $20 per day for each of the next two days, and $30 per day thereafter.

[9]Although, as the sentence below the table in Appendix D explains, the total demurrage shown in the table was subsequently adjusted downward by approximately $115,000, this ratio of charges that could be offset to those that could not remains accurate.

In this regard, it should be noted that the Court of Appeals misunderstood the significance of the cases cited by Monongahela (discussed by the court at p. A-5, App. A). Except for *Wheeling-Pittsburgh Steel Corp. v. Consolidated Rail Corp.*, ICC Docket No. 36943[10], those cases were cited not for the proposition that relief should be granted, but for the proposition that the Commission has, in other cases, considered the reasonableness of penalty demurrage in light of the proximate cause and due diligence tests even though the charges were incurred pursuant to an average agreement.

The approach taken in those cases should have been taken here. The Commission's determination to regard penalty demurrage as *per se* reasonable where there is an average agreement is not supported by the agreement, the tariff, logic, fairness or precedent.

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[10]*The Wheeling-Pittsburgh Steel Corp.* case was cited as an example of a case in which the relief denied to Monongahela was granted to another shipper under similar circumstances, the only important difference being the absence there of an average agreement.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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Dated:

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1365

MONONGAHELA POWER COMPANY,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Respondents,

BALTIMORE AND OHIO RAILROAD COMPANY, /R
Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION.

ARGUED DECEMBER 2, 1980
DECIDED AND ENTERED FEBRUARY 13, 1981

BEFORE BRYAN, SENIOR CIRCUIT JUDGE, RUSSELL AND MURNAGHAN, CIRCUIT JUDGES.

John M. Cutler, Jr. (Charles J. McCarthy, Belnap, McCarthy, Spencer, Sweeney and Harkaway; Ruth E. Kipp, Legal Department, Monongahela Power Company on brief) for Petitioner; Lawrence H. Richmond, Interstate Commerce Commission (Richard A. Allen, General Counsel, Henri F. Rush, Associate General Counsel; Sanford M. Litvack, Assistant Attorney General; John J. Powers, III, Andrea Limmer, Dept. of Justice on brief) for Respondents; John J. Paylor for Intervenor.

MURNAGHAN, Circuit Judge:

The winter of 1977-78 was bitter cold. Its after-effects still linger on. Monogahela Power Company seeks relief from an Interstate Commerce Commission order that denied Monongahela reparation of a part of $970,940 in demurrage charges paid to the Baltimore and Ohio Railroad. The share of the $970,940 for which reparation is sought represented not the actual costs of delay for the specific shipments in fact here involved, but rather that portion of the demurrage calculated to provide an inducement or incentive to prompt return which would contribute to an increased efficiency in operation of the rail system generally. The amounts designed to reimburse actual costs of delay are known as compensatory demurrage, and as to that portion of the $970,940, Monongahela does not seek reparation. The portion with which we must deal is known as a demurrage penalty.[1]

In the absence of a special understanding between shipper and carrier, straight demurrage, fixing debits for

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[1]Actually, the demurrage charges do not fit precisely in either classifiction. *See ICC v. Oregon Pacific Industries, Inc.*, 420 U.S. 184, 190 n. 7 (1975): " '[D]emurrage charges are in part compensation and in part penalty; . . . in full character they are neither, not being rates as that term is used in connection with rate-making, nor penalties as that term is used in respect to penal impositions. They are sui generis.' " The Supreme Court added: " '[D]emurrage charges have a dual purpose; and it is enough if one of them is a deterrent against undue detention of cars." *Id.* at 191.

We deal, therefore, with a situation where, although Monongahela may have done all within its power to avoid the delay, the cars were nonetheless removed from service. Hence, the delay is no less undue, viewed from the universal point of view of the railroads of the country as a whole, because Monongahela was not at fault. "The freight cars of the Nation thus became in essence a single common pool, used by all roads." *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 743 (1972).

any detentions beyond free time, applies. There is no bonus in the form of offsetting credits awarded when a car is released before expiration of free time. Frozen lading does generate a two day extension of free time for unloading.[2] In such a straight demurrage situation, the ICC has, with consistency, ordered reparation of the "penalty" portion of demurrage charges on proof that the shipper was not the proximate cause and had acted with due diligence. *E.g. Prince Mfg. Co. v. Norfolk & Western Ry.*, 356 I.C.C. 702 (1978).

To establish its freedom from fault, its due diligence, in an endeavor to establish its case for relief from demurrage penalties, Monongahela introduced evidence that it had installed heating and lump-breaking equipment to expedite unloading, and that it had hired additional personnel and incurred overtime for its regular employees to hasten the freeing and return of the freight cars. The Administrative Law Judge found that Monongahela had not proximately caused the car detentions, and that Monongahela had exercised due diligence. Neither of those findings has been disturbed in the course of the proceedings before the ICC.[3]

However, over and beyond applicable tariffs, for many years there has been in force an "average

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[2]Monongahela received such two day extensions, and there is no dispute over entitlement to or receipt of that amelioration applicable to cases of frozen lading.

[3]The ALJ ascribed all the delay to frozen lading. ". . . the strike of the mine workers was a mere exacerbation of the problems created initially by the difficulty in unloading the frozen coal. It is found that frozen ladings were the causal force of the detention." I.C.C. Decision No. 37151, at p. 7.

The parties have expressed no dissatisfaction with that finding, and the case has proceeded solely on a frozen ladings basis.

agreement" between the parties[4] relating to the manner of computing demurrage charges on Monongahela shipments carried by the B&O. The principal purpose of that agreement was to spread demurrage liabilities over all shipments, rather than calculate them solely on an individualized per car basis. In particular, the average agreement provided for credits allowable to Monongahela, as shipper, for early returns of cars prior to expiration of free time. Such early returns could be balanced against late returns, and only to the extent, if any, of a net excess of delayed cars would demurrage be payable.

The ICC determined that its policy of excusing shippers from demurrage penalties where freedom from fault could be shown had not been, and should not be, applied where the parties, by terms of the average agreement, had otherwise provided for a credit system for minimizing demurrage by assigning values to the shipper's favor in case of early release of freight cars. *See Marshall-Putnam Oil Co. v. Chicago, R.I. & P.R. Co.*, 316 ICC 581, 583 (1962) (weather interference); *Interstate Power Co. v. Chicago, Milwaukee St. Paul and Pacific Rr.*, ICC Decision No. 36743 (Decided November 21, 1978 (weather interference); *Indiana University Trustees—Petition Seeking Reparation of Demurrage Charges Caused by Severe Winter Weather*, ICC Decision No. 37001 (Decided March 14, 1979) (frozen lading); *International Minerals & Chemical Corp. v. Chicago and North Western Transportation Co.*, ICC Decision No. 37131 (Decided November 20, 1979) (frozen lading); *Cleveland Electric Illuminating Co. v. Consolidated Rail Co.* ICC Decision No. 37342 F (Decided August 22, 1980) (frozen lading); *Central*

[4]The uninterrupted duration of the average agreement, dating back to 1945, has exceeded 30 years. The average agreement was cancellable at any time by either party, effective on the first day of the month following notice.

Illinois Public Service Co. v. Illinois Central Gulf Rr., ICC Decision No. 37358 (Decided August 22, 1980) (frozen lading); *Carborundum Co. v. Louisville and Nashville Rr.*, ICC Decision No. 37330 F (Decided September 8, 1980) (severe weather conditions). The ICC has consistently determined not to allow a shipper the advantages of both straight demurrage and average agreement demurrage, while excusing it from the corresponding disadvantages of either.

Cases relied on by Monongahela either did not concern situations where average agreements had been entered, or, if an average agreement had been entered, were decided against the claimed reparation of demurrage. For that reason, they are not pertinent. See *Wheeling-Pittsburgh Steel Corp. v. Consolidated Rail Corp.*, ICC Decision No. 36943 (Decided February 23, 1979) (weather conditions and strike); *Federal Chemical Co. v. New York Central Rr.*, 308 ICC 386 (1959) (dealt with meaning of tariff which eliminated demurrage if weather interference made unloading impossible; held demurrage charge not to be abated); *Ford Motor Co. v. Chesapeake & O. Ry.*, 311 ICC 559 (1960) (no reparation granted); *Pennsylvania Rr. v. Kittaning Iron & Steel Mfg. Co.*, 253 U.S. 319 (1920) (the average agreement in that case, unlike the one involved here, provided that no demurrage should be collected when "shipments are frozen in transit so as to prevent unloading during the prescribed free time." The decision, moreover, rested on a conclusion that frozen lading was not sufficiently proven to justify the exemption).

The position adopted by the ICC is unassailable. Though Monongahela claims otherwise, this is not a case of tariff interpretation. To the contrary, the language of Freight Tariff 4-K naming General Car Demurrage Rules and Charges is altogether unambiguous in imposing the demurrage (both

compensatory and penalty). The question is simply whether the charge, clearly applicable, shall nevertheless, under the ICC's discretionary power to abate applicable tariffs and other charges, be forgiven to the extent of the penalty portion of the demurrage on the grounds that, in the circumstances, it is unreasonable. Hence cases such as *Coca-Cola Co. v. Atchison, T. & S. F. Ry.*, 608 F.2d 213, 218 (5th Cir. 1979) treating tariff interpretation as a matter of law, freely reviewable by the courts simply have no application. Instead we are in the area where " '. . . the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgement for that of the agency.' " *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974), *rehearing denied*, 420 U.S. 956 (1975).[5]

Monongahela makes the point that the brief average agreement between it and the B&O simply adopts the General Car Demurrage Rules and Charges, without spelling out any differences as to when and whether demurrage should be abated. It asserts that the same language should be accorded the same meaning and treatment whether it appears as part of a straight demurrage arrangement, or part of an average agreement. The point in no way advances Monongahela's cause. In either event, under straight demurrage or under average agreement, the applicable documents manifestly impose demurrage, penalty as well as compensatory. The difference comes only when

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[5] *Cf. United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 536 (1946): "Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene." *See also Consolo v. Federal Maritime Commission*, 383 U.S. 607, 621 (1966); *I.C.C. v. Jersey City*, 322 U.S. 503, 512-13 (1944).

the ICC has to decide whether, as a matter of discretion, to abate the penalty demurrage on a finding that the shipper was not the proximate cause and did exercise due diligence.

We have no occasion to investigate a possible clash between the extensive discretion conferred on the ICC and the spectre of arbitrariness which might arise if, in this case, we were dealing with a shipper operating on a straight demurrage basis. The prior general practice of reparation would, in that case, be a factor of weight on Monongahela's side. However, the B&O had functioned with Monongahela for over 30 years on an average agreement basis. Monongahela has been, consequently, in a position to earn credits for prompt release of cars, and thereby to reduce, overall, the demurrage which would have been payable on a straight demurrage basis.

Those grounds, especially since they have been consistently applied by the ICC in other cases, suffice to make the difference in treatment depending on a difference in contractual arrangements between carrier and shipper, reasonable.

We do not suggest, of course, that the mere existence of the average agreement foreclosed any other outcome. Presumably the power of the ICC to excuse payment of charges for justifiable reasons was still paramount. But the fact that the ICC *may* do something is no authority for the proposition that it *must* do it. The decision to deny reparation in the present case was neither arbitrary nor capricious nor unreasonable, nor an abuse of discretion. 5 U.S.C. § 706 (The Administrative Procedure Act).

AFFIRMED

INTERSTATE COMMERCE COMMISSION
DECISION
No. 37151 F
MONONGAHELA POWER COMPANY
v.
THE BALTIMORE AND OHIO RAILROAD COMPANY

Decided February 25, 1980
Served March 27, 1980

The Baltimore and Ohio Railroad Company (B&O or defendant) filed an administrative appeal on September 10, 1979, seeking reversal of the initial decision of the Administrative Law Judge. Monongahela Power Company (Monongahela or complainant) replied on October 4, 1979. We adopt the ALJ's statement of facts as our own,[1] and repeat the operative facts only to the extent needed to clarify our decision. However, we disagree with the ALJ's ultimate conclusion that the applicable demurrage charges were unreasonable in part.

Monongahela seeks reparation of the penalty portion of the demurrage charges assessed by B&O for the detention of its equipment for the period December, 1977 through April, 1978. The complainant contends and the ALJ agreed that frozen ladings resulting from severe winter weather were the proximate cause of the car detention. Finding that the complainant had taken every reasonable step to ameliorate the car-detention, the ALJ concluded that Monongahela was entitled to the requested relief and that the average demurrage agreement in the applicable tariff[2] did not bar recovery of the penalty portion of the demurrage charges.

[1]We note that in the ALJ's findings of fact-numbers 19, 23, 24, 25, 26, and 27 the references to the year 1979 should be changed to 1978.

[2]Tariff 4-K, Car Demurrage Rules and Charges, D.M. Rogers, Agent ICC H-74, Supplement 7, effective December 1, 1977.

On appeal, defendant argues that the average agreement precludes the reparation of any portion of the demurrage charges attributable to a penalty assessment. On the other hand, complainant contends that it never waived the right to obtain the relief it seeks and that it exercised due diligence to abate demurrage. However, we make no finding as to whether Monongahela's efforts constituted due diligence since the issue is not relevant here. The issue is whether the average agreement precludes the partial reparation of the involved demurrage charges.

Two items of Tariff 4-K are relevant to this case. Item 1420-series contains various provisions for relief from demurrage caused by weather interference. Paragraphs (1) and (2) concern weather interference. Paragraph (3) covers demurrage caused by natural disasters; a condition not present here. Paragraph (4) concerns lading which because it is frozen or congealed at the time of placement, cannot be unloaded within the free time. Item 855-series of Tariff 4-K concerns average agreement shipments and provides an exception to the relief in Item 1420, Paragraphs (1) and (2) but not to the relief in Paragraph (4). Paragraph (4) permits two additional days of free time if written notice of the extra time taken in heating, thawing and loosening the lading is given to the carrier within ten days of the release of the car. The two additional days of free time were accorded complainant on the detention at issue here. Item 1420(4) does not, as complaint seems to imply, obviate the average agreement on cars containing frozen lading. Such a construction of the relevant tariff provisions is strained and illogical.

The evidence clearly establishes that the assailed demurrage charges were assessed and applicable under the provisions of the average demurrage agreement. Such an agreement is a contract between the shipper

and the carrier containing specific conditions under which the shipper can obtain relief from demurrage charges. This Commission recognizes that an average agreement is a concession in favor of the shipper, a purpose of which is the offsetting of some demurrage caused by weather interference, frozen lading, or car bunching. Thus, these occurrences are provided for in the contract and may not be subsequently raised again to excuse the accrual of excessive detention time. Therefore, even if complainant was not the proximate cause of the detention and acted with due diligence the demurrage charges may not be found unreasonable. Compare No. 36743, *Interstate Power Company v. Chicago, Milwaukee, St. Paul, and Pacific Railroad Co., et al,* (not printed) decided by Division 1 on November 21, 1978, and No. 36945, *The Arundel Corporation, Guy F. Atkinson Company and Gordon H. Ball, Inc. DBA Arundel-Atkinson-Ball* v. *Columbus and Greenville Railway Company* (not printed), served April 20, 1979, where Division 1 in affirming a decision of this Board under similar circumstances noted that an average demurrage agreement is of a contractual nature. In view of the recent Commission policy of encouraging contract rates[3], the Division found itself unable to conclude that the voluntary agreement was inequitable. A similar conclusion is warranted here.

We find:

The demurrage charges at issue are applicable under the average demurrage agreement and are not shown to be unjust, unreasonable, or otherwise unlawful. This decision is not a major federal action significantly affecting the quality of the human environment or conservation of energy resources.

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[3]Ex Parte No. 358-F, *Change of Policy, Railroad Contract Rates,* (not printed) decided November 9, 1978, as clarified 361 I.C.C. 205 (1979). See also *Increased Rates on Coal, BN Montana to Superior WI,* 362 I.C.C. 625 decided today.

It is ordered:

The decision of the Administrative Law Judge is reversed to the extent inconsistent herewith. The complaint is dismissed.

By the Commission, Review Board Number 4, Members FitzPatrick, Fisher, and Felder (Member Felder not participating).

(SEAL) AGATHA L. MERGENOVICH
Secretary

Notice: This proceeding is now administratively final within the meaning of 49 CFR 1100.98(e) and (f), as amended effective December 7, 1978, 43 Fed. Reg. 57256 and 57257 and further amended June 29, 1979, 44 Fed. Reg. 37936 and 37937.

INTERSTATE COMMERCE COMMISSION

DECISION

No. 37151

MONONGAHELA POWER COMPANY

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY

Decided: August 13, 1979
Served: August 28, 1979

By John A. McMenamin, Administrative Law Judge:

In this complaint proceeding Monongahela Power Company of Fairmont, WV (complainant) seeks remission of that portion of demurrage charges of $970,940.00 borne and paid by it to The Baltimore and Ohio Railroad Company (B&O) for the period December, 1977 through April, 1978 to the extent such charges exceeded the applicable per diem rate plus a reasonable allowance for administrative expenses not to exceed 20% of such per diem charges plus interest.

Complainant, at all relevant times, operated a coal-fired power plant at Haywood, WV which used in roughly equal proportions high sulphur coal brought by conveyor belt from a local mine and low sulphur coal transported by B&O from southern West Virginia and eastern Kentucky. The applicable tariff under which the low sulphur coal moved was Tariff 4-K Car Demurrage Rules and Charges, D.M. Rogers, Agent ICC H-74, Supplement 7, effective December 1, 1977. The tariff contains the usual average agreement, strike, and weather interference, clauses. By Item 1420-B it provides that when at the time of actual placement, lading is frozen or congealed so as to require heating,

thawing or loosening to unload, a consignee desiring additional time to unload, shall within 10 days after unloading certify in writing as to each car the amount of time expended in heating, et cetera, to unload it and the day (7 a.m. to 7 a.m.) on which it was actually unloaded. Accrued demurrage charges will be relieved thereby up to a maximum of 2 days, exclusive of the date of actual unloading.

While the parties in the course of argument cite certain provisions of the tariff, it should be kept in mind that neither the applicability of, nor the computation of demurrage days under, the tariff is here in issue. The only issue presented by this complaint is whether "the cause of the detention *was* beyond the control of the consignee as well as the carrier"[1] so as to render the penalty portion of the demurrage charges unreasonable in violation of 49 U.S.C. §§ 10701, 10750 and 10704. The question, then, is one of fact rather than law but before discussing the facts it would be well to keep the essential elements of the law applicable to demurrage in mind.

Law of Railroad Demurrage

Jurisdiction: This Commission, like any other Federal agency, can exercise only such powers as are specifically vested by statute. Under 49 U.S.C. § 10709 a finding that a railroad has "market dominance," that is, an absence of effective competition from other carriers or modes of transportation for the service to which the rate applies, is a jurisdictional prerequisite to any determination by this Commission that a railroad rate is unreasonably high.

Here, because it is not the excessiveness of the demurrage charges, as such, but the reasonableness of the imposition of the penalty portion thereof in the

[1]Complaint, para. 15

circumstances then pertaining, that is challenged, a finding of market dominance by B&O is not a jurisdictional necessity before the Commission can proceed to a determination of the merits.

Railroad Demurrage: Demurrage charges in railroad law serve both to compensate a railroad for the unnecessary detention of its equipment and impose a penalty to insure prompt return of a car to public service. Although such charges may follow a shipment and be collected together with the transportation charges, they are for a distinct and separate service: *Krass Bros. Lumber Co. v. Director General,* 92 I.C.C. 450, 453 (1924); *Baltimore & O.C.T.R. Co. v. United States,* 583 F. 2d 678 (3rd Cir, 1978).

While there is a punitive element in a demurrage charge, it is a monetary penalty, whose incidence, like all other tariff charges, is determined on contractual principles without reference to "culpability" or "fault": *Middle Atlantic Conference v. United States,* 353 F. Supp. 1109, 1114-5 (DC, 1972); *Union Pacific Railroad Company v. United States,* 490 F. 2d 1385, 1390 (Ct. C1. 1974). Nevertheless, review of the case law indicates that while the determination of liability for that portion of the demurrage charge which is compensatory retains the common law concept that only the most extraordinary extra-tariff-allowance happening[2] will excuse one whose omission breaches his contract, the determination of whether the penalty portion should be remitted considers excuses not provided for in the tariff, nor acceptable under the common law of contract.

In *Chrysler Corp. v. New York Central R. Co.,* 234 I.C.C. 755 (1939) where a "sit-down" strike by Chrysler

[2]The Great Chicago Blizzard of 1967 involving a 23 "snowfall, 19" in one day: *Chicago, B&O R. Co. v. Edward Hines Lumber Co.,* 320 F. Supp. 193.

employees led to court orders not enforced by the State of Michigan and control of the plant gates by the State Police in co-operation with the strikers, the Commission reviewed the law of demurrage since the promulgation of the first demurrage code by the National Association of Railway Commissioners in 1910. Noting that although this code was approved by the Commission, but not prescribed, and that its "rigidity" or "austere character" (p. 761), was undoubtedly required by the exigiencies of the car shortages of 1906 and thereafter (p. 759), the Commission found that in the existing circumstances of car plenty, there was no reason for the imposition of a charge so heavily penal in its nature as the code provided, particularly when the breakdown in law and order eliminated the possibility of personal discrimination or preference.

The penalty portion of demurrage charges has often been remitted since *Chrysler* with varying indulgence depending on the existence at the time of detention of a car service order of this Commission. The evolved rule, found in *Prince Manufacturing Co. v. Norfolk and Western*, 356 I.C.C. 702 (1978) is, that even when a car service order is in effect, the penalty portion may be remitted where the detainer is powerless to avoid or abate the detention because of circumstances beyond its control upon a showing by the party against whom demurrage is assessed that it (a) was not the "proximate cause" of the detention and (b) exercised "due diligence" to avoid or abate the detention and (b) exercised "due diligence" to avoid or abate the detention and in releasing or attempting to release the detained cars (p. 705).

"Proximate Cause" as used in demurrage law is a much narrower concept than the "but-for" test of proximate cause in tort law. It requires something more than the unexpected or irresistible intervention of an

agency not directly under the car detainer's control to relieve penalty charges. If the catalytic event was within the ambit of prudent foresight (*Prince*, p. 706) or an "economic vagary or risk of doing business," such as the collapse of a plant building, fire, embargo, ordinary strike, blocking of tracks by a third person, etc., (*Davison Chemical Co. v. New York Central R. Co.*, 298 I.C.C. 191 (1956)) it is not such a "proximate cause" as to render the detainer powerless.

The apparent harshness of this view of causation becomes less so when it is considered that a railroad must entrust expensive equipment, often not its own, to a multitude of persons whose activities or lack of activity it can neither supervise nor adequately investigate. Demurrage rules must be somewhat draconian and "pleas of individual hardship", as the *Davison Chemical* decision put it (p. 193), must be entertained with caution if the demurrage rules are to avoid the detriment to the carrier and the public they were designed to prevent. The causal force of the detention, then, must be shown to be such as to be completely out of the detainer's control, not foreseeable to a prudent man, and unrelated to the nature of the detainer's business. Once the cause of the detention is deemed attributable to the detainer, the inquiry goes no further and demurrage charges are payable in full (*Ormet Corp. v. Illinois Central R. Co.*, 341 I.C.C. 647, 651-2 (1972)) whether or not due diligence was exercised to abate or relieve the detention thereafter.

(b) *Due Diligence:* The analysis does not end with the determination that the casual force of the detention was attributable to another than the detainer, or even to the carrier itself. The holder of the cars is nevertheless obliged to prove that he exercised due diligence to avoid or abate the detention: *Ormet Corp.*, supra.

In applying the due diligence standard, the focus should be on what is reasonable under the circumstances. The car-holder is required to show that it made special efforts to avoid demurrage where it was reasonably foreseeable, or special efforts to abate detention if it was not foreseeable: *Prince Manufacturing Co., supra* @ 706. And, as the Commission emphasized there, 49 U.S.C. § 10750 requires that rules and regulations relating to demurrage charges should be established in such a manner as to fulfill the national needs with respect to freight car utilization and distribution and maintenance of an adequate freight car supply available for the transportation of property.

FINDINGS OF FACT

1. Complainant, a public utility, operates an electric power plant at Haywood, WV whose furnaces, fueled primarily by coal, consume about 5,000,000 tons of coal annually.
2. About one-half of the coal so consumed is low sulphur coal brought to the plant by B&O and placed on industrial tracks in the power plant yard.
3. The industrial tracks can hold 140 rail cars.
4. Cars so placed are switched to a mechanical car dumper and individually rotated to an upside down position, the coal falling from the cars onto the through a grate with 12" square grids into a feeder opening with an associated conveyor belt.
5. The machanical dumper has the capacity to unload between 140 and 150 coal-laden cars per day.
6. In the early part of December, 1977 and thereafter through March, 1978 coal cars being delivered to the power plant contained frozen ladings with the result that, after dumping, frozen coal still adhered to the bottom and sides of cars and frozen coal lumps would accumulate on the grate.

7. The record is silent as to the date of the first operation of the lump breaker other than that it was added prior to the winter of 1977-8.

8. A thawing shed of 7.5 cars per hour capacity constructed by complainant was put into operation on December 22, 1977.

9. Complainant unloaded 2,395 coal cars during December, 1977.

10. Twenty-six coal-laden cars remained in complainant's yard at the end of December, 1977.

11. No laden cars were placed on the industrial tracks during the period December 30, 1977 to January 13, 1978. On the latter date 66 cars were placed by B&O, 11 of which were unloaded on January 19; 29 on January 21; 21 on January 22; 2 cars on January 23 and 3 cars on January 24, 1978.

12. The cars placed on January 13, 1978 were extensively frozen and although placed in the thaw shed, the congealed lumps could not be pulverized by the lump breaker.

13. A heavy snowfall on January 20, 1978 blocked all switching movements for 8 hours.

14. The snow on top of the ladings after January 20, 1977 had the effect of plugging the hoppers and the conveying system resulting in very few cars being unloaded on January 21 and 22, 1978.

15. During January, 1978 complainant unloaded 176 cars.

16. During February, 1978 despite cessation of unloading operations on and after February 17, 1978 (as to which see below) 128 cars were unloaded but 728 laden cars remained at the end of the month.

17. In March, 1978 despite snow and 6" slabs of ice in and on the cars and cessation of unloading operations through March 10, (see below) 1,165 cars were unloaded but 779 cars were still detained at the end of the month.

18. In early April 1978 complainant's unloading operations returned to normal.

19. During January and February, 1979 coal in cars placed in the thawing shed for two hours thawed only a few inches around the sides and several hours were required to break the coal small enough to fall through the grate.

20. The winter of 1977-78 (defined as December, January and February) was the fourth coldest since 1931; the coldest being the immediately preceding winter of 1976-7. If the winter were to be defined as December through March, the winter of 1977-8 was colder than that of 1976-7 in the area involved. During the month of December, 1977 the average temperature was 33.3[3], 0.4 above normal; in January, 1978 23.4, 7.5 below normal; in Feburary, 21.3 or 11.1 below normal; and in March 37.6 or 2.6 below normal.

21. The thaw shed was installed at a cost to complainant of $1,120,286; the lump breaker, $576,959; overtime costs for unloading personal during the relevant period were $25,369; and for outside help for such tasks as snow and ice removal, $58,248.

22. On December 7, 1977 members of the United Mine Workers union, although not employees of complainant, began picketing activities at the power plant. On December 8 more than 50 such pickets were at the plant entrance, acting

[3]All temperatures are in degrees Fahrenheit.

belligerently toward complainant's employees. After pickets boarded a B&O train removing empty coal cars from the plant's industrial tracks, B&O crews adopted an operating procedure of moving and removing cars to and from the plant only during daylight hours. Truck deliveries to the plant were effectively halted by picketing.

23. On February 17, 1979 the picketing became violent to the degree that complainant notified B&O that unloading operations would be indefinitely terminated.

24. Complainant's unloading operations were not resumed until March 10, 1979.

25. When complainant recommenced unloading operations on March 10, 1979 some cars placed or constructively placed in the interim could be unloaded without difficulty while others were frozen solid.

26. It was necessary for complainant to have environmentally desireable low sulphur coal for its plant. The United Mine Workers strike caused all normal contract suppliers in West Virginia to cease rail deliveries as of December 6, 1977. Supplies of such coal from Kentucky were shipped only sporadically thereafter. On and after January 18, 1979 in order to meet its legal obligation to supply electricity to its customers, complainant placed orders for 140,000 tons of coal from other states to be shipped under freeze proof conditions by rail. That such coal was to be supplied by firms not organized by the United Mine Workers was not a consideration in placement of such orders, although it may be inferred that such deliveries would not decrease picketing activities.

27. On February 13, 1979 complainant diverted 18,000 tons of coal in cars backed up at the Haywood plant to another of its plants in Pennsylvania.

28. B&O properly and accurately assessed, pursuant to the provisions of the applicable tariff heretofore described, demurrage charges on coal cars detained by complainant beyond the free time and extended time provided in said tariff in the amount of $970,940.00, for the months of December, 1977 through April, 1978, inclusive.

29. Complainant bore and paid such charges on a date or dates not disclosed of record.

30. At no time relevant hereto was a car service order of this Commission in effect nor was there a shortage of coal cars available to the public.

31. There being no evidence to the contrary, it is inferred and found as fact, that the detention of B&O cars did not reduce the efficiency of B&O operations nor deprive any shipper or consignee of the adequate and prompt furnishing of cars for the transportation of its shipments.

DISCUSSION AND CONCLUSIONS

As indicated, we are concerned only with the imposition of the penalty portion of the involved demurrage charges.

The "proximate cause" of the demurrage was the freezing of ladings. B&O correctly points out that the average agreement and the tariff provision for extended free time in the event of frozen ladings do not relieve complainant from tariff liability. So much complainant concedes, insofar as the compensatory portion of the demurrage charges is concerned. When the detainer of rail cars seeks reparation of the penalty portion of demurrage charges, it in effect concedes the

applicability of the tariff and propriety of the assessment but challenges only the reasonableness of the penalty assessment in the circumstances.

In the precis of the law pertaining to railroad demurrage the writer deliberately refrained from an attempt to categorize the numerous decided cases involving remission of penalty demurrage charges involving frozen ladings and strikes. The focus of the determination is the reasonableness of the car detainer's actions or omissions under the circumstances, and facts, not analogies, are controlling.

The starting point of the factual analysis is that there is absolutely no reason to suppose that complainant wanted to, or could hope to, derive any advantage from detention of the cars beyond free time and the extended free time. To the contrary, with an intricate, sophisticated, mechanical coal car unloading system geared to the feeding of its furnaces and limited trackage capacity (when compared to its demands for rail-brought fuel) any unloading delays would have worked to complainant's disadvantage.

There is no reason, either, to disbelieve complainant's assertion that frozen ladings as of early December, 1977 were the casual force of all subsequent detention, or that the strike of the mine workers was a mere exacerbation of the problem created initially by the difficulty in unloading the frozen coal. It is found that frozen ladings were the causal force of the detention. To be sure, the tariff itself indicates that the prospect of frozen ladings was within the contemplation of the parties, but the provision for extended free time in that event does not compel an inference that the penalty portion must be enforced. An equally strong inference is that without an extended time provision for frozen ladings even the per diem portion of the charge could be deemed unreasonable.

Complainant has proven that the period December 1977 through March 1977 was one of the coldest such periods since 1931. Mr. Patterson of B&O acknowledges (statement, p. 3) that the severe weather conditions of the time, created operating problems for shippers and receivers of rail freight and in many cases contributed to the accrual of demurrage charges. A cruel winter may be within the ambit of prudent foresight and might be considered a vagary or risk of doing business which could compel, say, cosmetic manufacturers to either halt operations or risk demurrage charges. A public utility, on the other hand, must operate whatever the weather: to worse the winter, in fact, the greater its duty to fullfil its legal obligations. It is concluded that complainant had no choice: it was powerless to avoid the detention likely to accrue through frozen ladings by diverting freight enroute or cancelling orders. Indeed, it was imperative that it should get all the low sulphur coal it could to ensure an environmentally acceptable fuel mix.

That the strike picketing might escalate to the point of halting all unloading activities, was undoubtedly foreseeable; that such cessation would lead to deeper freezing of ladings already in place or coming in equally so. In this regard, as in complainant's continuing to seek out and ship coal to the plant, its paramount duty excuses what could otherwise be inexcusable.

That is not to say that complainants status as a public utility absolves it from all penalty demurrage charges. If it had sat back merely accumulating laden cars, its own public duty would hardly lead to forgiveness of penalty demurrage. But it did make special efforts. It is beside the point that the lump breaker and the thaw shed were not effective to relieve the detention. The point is that complainant made the effort, at very considerable

expense, and in making the effort exercised a degree of foresight and imagination in devising and implementing a possible solution to the frozen coal unloading problem. It is noted that complainant's attempted solution was not even mentioned in railroad argument in *Prince Manufacturing*, which was a frozen coal lading case decided in April, 1978. Indeed, complainant's effort, its expense, even its failure, point up the severity of the freezing, the intractability of the problem, and complainant's need to have the coal unloaded.

In the final analysis, the penalty portion of a demurrage charge is justified only by the public policy that rail cars be kept in circulation for the benefit of all: *Chronicle Publishing Co. v. Great Northern Ry. Co.*, 243 I.C.C. 279, 281 (1941); 49 U.S.C. § 10750. Even in a time of car plenty complainant should not be excused from continuing to accumulate cars after its mechanical solutions proved inadequate and in the teeth of increasingly menacing picketing; and would not be forgiven penalty demurrage were it not for the even more compelling public policy that complainant be not thereby inhibited from making every effort to provide electricity for homes and businesses during an exceptionally severe winter. The effort alone justified the remission here.

An award of interest does not automatically follow a decision favorable to complainant. The date or dates of payment of the demurrage charges are not given and complainant may have prejudiced B&O in these times of rapidly rising interest rates by waiting for almost a year before filing this complaint. It was made quite clear in *Prince* at p. 707 that private negotiations and special docket applications would be futile.

FINDINGS

1. The instant demurrage charges borne and paid by complainant were applicable but unlawful in that imposition thereof in the circumstances was unreasonable insofar as said charges exceeded the applicable per diem rate plus 20% for incidental expenses, without free time for loading and unloading and without allowance for Saturdays, Sundays, or holidays.
2. Complainant was damaged to the extent of the excess payment above described.
3. This decision is not a major Federal action entailing significant environmental or energy consumption consequences.

ORDER

1. The defendant is authorized and directed to pay the complainant that portion of the demurrage charges in issue which exceeds the applicable per diem rate plus 20% for incidental expenses, without free time for loading and unloading and without allowance for Saturdays, Sundays or holidays.
2. The defendant shall file, within 30 days after the effective date of this Order, a statement similar to that required under 49 C.F.R. 1100.95, so that the Commission can determine whether the repayment as calculated by the parties accords with the findings and order herein.
3. This order will become effective 20 days after service date unless appealed, stayed, or postponed.

By the Commission, John A. McMenamin, Administrative Law Judge.

(SEAL)

AGATHA L. MERGENOVICH
Secretary

UNADJUSTED DEMURRAGE CHARGES

	Chargeable Days			Charges Under Freight Tariff 4-K		
Month	$10/day	$20/day	$30/day	$10/day	$20/day	$30/day
12/77	1,907	917	1,769	$19,070	$18,340	$53,070
01/78	1,646	752	2,916	16,460	15,040	87,480
02/78	377	113	105	3,770	2,260	3,150
3/78	3,558	1,696	25,362	35,580	33,920	760,860
4/78		50	1,200		1,000	36,000
TOTAL	7,488	3,528	31,352	$74,880	$70,560	$940,560

These demurrage charges were reduced to reflect the run-around adjustment and other adjustments by The Baltimore and Ohio Railroad Company and corrected invoices were rendered, in the amount of $970,940.

On October 6, 1978 Monongahela Power Company paid the demurrage amounts to The Baltimore and Ohio Railroad Company. The payment of these charges was without prejudice to its right to challenge their lawfulness in this complaint proceeding. The complaint previously filed herein by Monongahela Power Company sets forth the demurrage charges to be $935,070.00. The amount stated herein, $970,940.00, is the payment amount and Monongahela Power Company has filed a motion for leave to amend the Complaint to reflect the amount paid by it to The Baltimore and Ohio Railroad Company.

In this proceeding Monongahela Power Company seeks recovery from The Baltimore and Ohio Railroad Company of the difference between the amount paid and a sum determined by aggregating the

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No. 80-1913

In the Supreme Court of the United States

OCTOBER TERM, 1980

MONONGAHELA POWER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, in view of an agreement between petitioner and a railroad providing an alternative method for minimizing petitioner's overall demurrage charges, the Interstate Commerce Commission abused its discretion in declining to order the refund to petitioner of particular demurrage charges that were properly assessed by the railroad under the applicable tariff.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-7) is reported at 640 F. 2d 504. The opinions of the Review Board of the Interstate Commerce Commission (Pet. App. A-8 to A-11) and of the Commission's administrative law judge (Pet. App. A-12 to A-26) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1981. The petition for a writ of certiorari was filed on May 14, 1981. The jurisdiction of this Court rests on 28 U.S.C. 2350 and 1254(1).

STATEMENT

1. Railroads assess demurrage charges against shippers with respect to cars that the shippers do not unload within a specified period of "free time." Under the tariffs applicable in this case, the charges were $10 per car for each of the first four days beyond the initial free time, $20 for each of the next two days, and $30 for each subsequent day (Pet. 13 n.8). Such demurrage charges have a double purpose: "One is to secure compensation for the use of the car and the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention." *ICC* v. *Oregon Pacific Industries, Inc.*, 420 U.S. 184, 189-190 (1975), quoting *Turner Lumber Co.* v. *Chicago, M. & St. P. Ry.*, 271 U.S. 259, 262 (1926).

The tariff of respondent Baltimore & Ohio Railroad Company (B & O) contains two alternative methods for computing demurrage charges: the straight demurrage and the average agreement methods. Under the straight demurrage method, the shipper is assessed demurrage charges at the rate set forth in the tariff on each car that is held beyond the free time for loading and unloading. Under the average agreement method, however, the shipper may offset demurrage charges (at the rate of $10 per day) on those cars that are held beyond the period of free time with "credits" earned on other cars that were released within the first 24 hours of free time (Pet. App. A-4).

Straight demurrage automatically applies unless the shipper and railroad have agreed to use the average agreement method. B & O and petitioner agreed in 1945 to use the average agreement method, and that agreement has been in effect ever since. Either party could have canceled the average agreement at any time and reverted to the straight demurrage method, but neither petitioner nor B & O elected to do so (Pet. App. A-2 to A-4).

2. B & O delivered cars containing coal to one of petitioner's generating plants during the winter of 1977-1978.[1] Petitioner had difficulty unloading the coal, however, because cold weather had frozen the coal inside the cars. The unloading difficulties prevented petitioner from returning many of the cars to B & O within the period of free time specified in the tariff. As a result, B & O assessed demurrage charges against petitioner in the amount of $970,940 (Pet. App. A-2).[2] Petitioner paid the charges and then filed a complaint with the Interstate Commerce Commission seeking a refund of the portion of the charges that could be said to be a penalty for retention of the cars, rather than compensation to B & O for use of the cars during the period of delay. Applying the principle that a shipper is entitled to a refund of penalty demurrage if the shipper's actions were not the proximate cause of the events leading to the assessment of the demurrage and the shipper exercised due diligence to avoid the demurrage, the administrative law judge ordered B & O to refund the penalty portion of the demurrage (*id.* at A-12 to A-26).

B & O appealed the ALJ's decision to a Review Board composed of three Commission employees. The Review Board reversed the ALJ's decision and dismissed the complaint, holding that the existence of the average agreement between B & O and petitioner precluded recovery of the penalty portion of the demurrage charge (Pet. App. A-8 to A-11). The Board concluded that the average agreement is in the nature of a contract between the shipper and carrier that contains specific conditions for relief from demurrage

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[1]The demurrage charges assessed against petitioner by B & O during the previous winter of 1976-1977 were involved in *Monongahela Power Co.* v. *United States*, No. 80-1268, cert. denied (Mar. 30, 1981).

[2]B & O adjusted the demurrage charges to take account of the two additional days of free time the tariff affords in cases of frozen lading (Pet. App. A-3 & n.2).

by permitting the shipper to offset charges with credits earned on other cars. Where the parties have addressed the demurrage issue in this fashion, the Board ruled, the Commission should not afford administrative relief different from that provided for in the agreement between the parties. Accordingly, the Board found that when parties have executed an average agreement, demurrage charges from frozen lading may not be found unreasonable, even if the shipper's actions were not the proximate cause of the detention and the shipper acted with due diligence to avoid the detention. The Board found further support for its conclusion in the Commission's recent policy pronouncements encouraging the establishment of rates by contract (*id.* at A-10).

The full Commission denied petitioner's request for discretionary review of the Review Board's decision, concluding that the case did not present an "issue of general transportation importance" (Pet. 5).

3. The court of appeals affirmed the Commission's decision in all respects (Pet. App. A-1 to A-7). The court found that the Commission's denial of petitioner's refund request was an appropriate exercise of the Commission's discretion to determine whether clearly applicable demurrage charges are nevertheless unreasonable in the circumstances of a particular case (*id.* at A-6). The court acknowledged the Commission's general policy of ordering a refund of the penalty portion of demurrage charges to a shipper that was operating under the straight demurrage method, where the shipper did not cause the detention and acted diligently to reduce the amount of demurrage. The court held, however, that the Commission's different treatment of petitioner was reasonable because the Commission has consistently denied demurrage refunds where an average agreement is in effect between the parties and because, in the court's view, the average agreement had afforded petitioner the opportunity

to reduce its overall demurrage charges during the 30 years the agreement was in effect (*id.* at A-7).

ARGUMENT

Petitioner argues that, as a matter of tariff interpretation, it is entitled to abatement of the penalty portion of the demurrage charges,[3] and that, in any event, the Commission's stated basis for treating it differently from shippers not operating under average agreements is not rational. These claims are insubstantial.

The court of appeals correctly rejected petitioner's argument (Pet. 11-12) that, as a matter of interpretation of B & O's tariff, it is entitled to a refund of the penalty demurrage due to frozen lading. The court below found that the applicable tariff "is altogether unambiguous in imposing the demurrage (both compensatory and penalty)" (Pet. App. A-5 to A-6). Accordingly, as the court remarked (*id.* at A-6): "The question is simply whether the charge, clearly applicable, shall nevertheless, under the ICC's discretionary power to abate applicable tariffs and other charges, be forgiven to the extent of the penalty portion of the demurrage on the grounds that, in the circumstances, it is unreasonable."

---

[3]Petitioner contends (Pet. 11) that the Commission was obligated to afford it relief because the average agreement, which incorporates by reference the terms of the General Demurrage Tariff, does not by its terms prohibit relief from demurrage charges associated with frozen lading (beyond the two additional days of free time expressly provided in cases of frozen lading), in contrast to the express provision for relief from demurrage charges associated with weather interference and bunching. But the Commission does not argue that it was *foreclosed* by the tariff from granting petitioner relief from a portion of the demurrage charges; rather, the Review Board concluded that the voluntary agreement is not inequitable and declined to order relief as a matter of discretion (Pet. App. A-10). The court below found that the agency's denial of relief was a reasonable exercise of agency discretion under the circumstances (*id.* at A-6).

Applying the standard of review articulated by this Court in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974), for judicial review of discretionary agency action, the court of appeals properly upheld the Commission's denial of relief from the penalty portion of the demurrage as "neither arbitrary nor capricious, nor unreasonable, nor an abuse of discretion" (Pet. App. A-7). Indeed, the court found "unassailable" (*id.* at A-5) the Commission's position that the penalty portion of the demurrage should not be forgiven here, in view of the average agreement in effect between petitioner and B & O.

Surely, it is neither arbitrary nor an abuse of discretion for the Commission, in determining whether a portion of the clearly applicable demurrage charges should be refunded in a particular case, to take into consideration an agreement between a railroad and a shipper that provides an alternative method for minimizing the shipper's overall demurrage charges—*i.e.*, by assigning values to the shipper's favor, through a system of credits, where cars are released early in the free time period.[4] Because an average agreement provides "a concession in favor of the shipper" (Pet. App. A-10) that is not available to other shippers that operate under the straight demurrage method, it is not unreasonable for the Commission to treat a shipper such as petitioner differently based on an average agreement providing for mitigation of demurrage in a particular way, and, therefore, to decline to order a refund of demurrage that may be available to shippers operating under the straight demurrage method.

---

[4]Petitioner's additional contention (Pet. 10-14) that the court of appeals erroneously relied upon a rationale not in the Commission's decision is incorrect. The Commission refused to abate the demurrage charges because those charges were not unreasonable or inequitable, in view of the average agreement (Pet. App. A-10). The court of appeals affirmed the Commission's rationale (*id.* at A-4, A-7).

As the court of appeals observed, "[t]he ICC has consistently determined not to allow a shipper the advantages of both straight demurrage and average agreement demurrage, while excusing it from the corresponding disadvantage of either" (Pet. App. A-5). Yet that is what petitioner seeks here—to continue to benefit from the averaging of demurrage, in accordance with the terms of the agreement it has had with B & O over the last 30 years, and, beyond that, to obtain a refund of the penalty portion of the demurrage in this particular case. Especially given the consistent Commission practice identified by the court of appeals (Pet. App. A-5), the Commission acted reasonably in distinguishing among shippers, for purposes of demurrage refunds, on the basis of the contractual relationship between the shipper and the railroad.[5]

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[5]Petitions for review of other Commission orders involving the issue presented by this case are currently pending in three courts of appeals. See *Empire-Detroit Steel Division* v. *ICC*, No. 80-2790 (3d Cir., filed Dec. 17, 1980); *Cleveland Electric Illuminating Co.* v. *ICC*, Nos. 80-3727, 80-3792, and 80-3793 (6th Cir., filed Nov. 14, 1980); *Central Illinois Public Service Co.* v. *ICC*, No. 80-2006 (7th Cir., filed July 28, 1980). Should one of these courts of appeals reach a decision in conflict with the decision below, this Court may consider at that time whether further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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and

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Intervening Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF INTERVENING RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether or not the action of the Interstate Commerce Commission in denying reparation of the penalty portion of demurrage charges, when the shipper has obtained alternate relief through the average agreement, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

DISCLOSURE STATEMENT REQUIRED BY RULE 28.1

The Baltimore and Ohio Railroad Company is a subsidiary of The Chesapeake and Ohio Railway Company, which owns 99.9% of its capital stock. The Chesapeake and Ohio Railway Company is a wholly-owned subsidiary of CSX Corporation. Other corporations (other than wholly-owned corporations) which are subsidiaries or affiliates of B&O are shown below:

The Akron and Barberton Belt RR Co.
The Akron Union Passenger Depot Co.
Allegheny and Western Ry. Co.
Atlanta and West Point RR Co.
Augusta & Summerville RR Co.
The Baltimore and Cumberland Valley RR Extension Co.
The Baltimore and Philadelphia RR Co.
Beaver Street Tower Co.
Belt Railway Co. of Chicago
Buffalo, Rochester and Pittsburgh Rwy. Co.
Central Florida Pipeline Corp.
Central RR Co. of South Carolina
Central Transfer Rwy. & Stge. Co.
Chatham Terminal Co.
Chicago South Shore and South Bend RR
Chicago & Western Indiana RR Co.
Cincinnati Inter-Terminal RR Co.
Cincinnati Union Terminal Co.
Clearfield and Mahoning Rwy. Co.
The Cleveland Terminal & Valley RR Co.
Clinchfield RR Co.
Columbia, Newberry & Laurens RR Co.
Dayton and Michigan RR Co.
The Dayton and Union RR Co.
Durham and Southern Ry. Co.
Duval Connecting RR Co.
Eastern Hardwoods, Incorporated
First Georgia Development Co.
Fruit Growers Express Co.
Georgia RR
Green Real Estate Co.

Haysi RR Co.
High Point, Thomasville & Denton RR Co.
Holston Land Co., Inc.
The Home Avenue RR Co.
Illinois Terminal RR Co.
James Center Development Co.
Kentucky & Indiana Terminal RR Co.
The Lakefront Dock and RR Terminal Co.
Littleton Fuel Company
Louisville, Henderson & St. Louis Ry. Co.
Mid Allegheny Corporation
Monon Coal Co., Inc.
The Monongahela Rwy. Co.
Nashville & Decatur RR Co.
New Gauley Coal Corporation
Nicholas, Fayette and Greenbriar RR Co.
Norfolk and Portsmouth Belt Line RR Co.
North Charleston Terminal Co.
Paducah & Illinois RR Co.
Park-N-Shop, Inc.
The Pullman Co.
Richmond, Fredericksburg and Potomac RR Co.
Richmond Land Co.
Richmond-Washington Co.
Savannah River Terminal Co.
South Carolina Pacific Ry. Co.
Terminal RR Assoc. of St. Louis
The Toledo Terminal RR Co.
Trailer Train Co.
The Tylerdale Connecting RR Co.
Washington County RR Co.
The Washington Terminal Co.
Wesjax Development Co.
Western Maryland Company
Western Maryland Ry. Co.
Western Ry. of Alabama
The Winchester and Potomac RR Co.
Winston Land Corp.
Winston-Salem Southbound Rwy. Co.
Woodstock & Blocton Ry. Co.

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Intervening Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The right of a railroad to impose a demurrage charge in the nature of a penalty to secure the prompt release of cars held by shippers and consignees for loading or unloading has long been recognized. *Turner, D. & L. Lumber Co. v. Chicago, M. & St. P. R. Co.*, 271 U.S. 259 (1926); *Pennsylvania R. Co. v. Kittaning I. & S. Mfg. Co.*, 253 U.S. 319 (1920); *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281 (1917). This right was standardized in 1909 in a Uni-

form Demurrage Code adopted by the Railroads and endorsed by the Interstate Commerce Commission. *Swift & Co. v. Hocking Valley R. Co., supra; In Re Demurrage Investigation,* 19 I.C.C. 496 (1910).

This Uniform Demurrage Code contained two alternative methods of computing demurrage charges, generally known as the "straight plan" and the "average agreement." These two plans remain in effect today, essentially unchanged from those contained in the original Uniform Code. Under the "straight plan," charges are computed separately on each rail car. If a shipper elects to have its charges computed pursuant to the "average agreement," cars released within the first 24 hours of free time earn a "credit," which may be used to offset "debits" incurred on cars held beyond the expiration of free time. At the end of each calendar month, the debits and credits are calculated, and charges for excess debits, if any, are assessed. No more than four chargable days on any one car may be offset by credits earned on other cars, and any excess credits remaining at the end of the month are cancelled. *Car Demurrage Rules, Nationwide,* 350 I.C.C. 777 (1975); *Increased Demurrage Charges, 1956,* 300 I.C.C. 577 (1957).

Although the average agreement is mutual in its effect, involving a give-and-take of advantages between carrier and shipper, it is generally viewed as a concession in favor of the shipper or consignee, whereby the shipper or consignee may reduce its obligation for demurrage charges. *Demurrage Rules & Charges, Nationwide,* 340 I.C.C. 83, 85 (1971); *Berwind White Coal Mining Co. v. Chesapeake & O. Ry.,* 289 I.C.C. 535, 540 (1953). As a part of the give-and-take, the shipper or consignee electing the average agreement basis of calculating charges gives up certain rights for relief from charges available to shippers utilizing the straight plan. *Car Demurrage Rules, Nationwide,*

supra. Each shipper determines for itself whether the straight plan or the average agreement is most advantageous to it, and shippers and consignees can and do change from one plan to another. *Increased Demurrage Charges, 1956, supra*, at 579.

In this case, Monongahela, which has enjoyed the benefits of the average agreement for 30 years,[1] now seeks additional relief from demurrage charges which accrued during the winter of 1977-78 as a result of delays in unloading rail equipment incurred because the equipment arrived with frozen coal. The Interstate Commerce Commission denied relief on the grounds that the average agreement is a contract between the carrier and the shipper under which the shipper can obtain relief from demurrage charges, that the average agreement is recognized as a concession in favor of the shipper which provides that demurrage charges caused by weather interference, frozen lading, or car bunching are offset by the debit and credit balancing of the agreement, and that therefore such occurrences may not be subsequently raised to excuse the accrual of excessive detention time.

The Fourth Circuit Court of Appeals affirmed the ICC, stating that its position, that "its policy of excusing shippers from demurrage penalties where freedom from fault could be shown had not been, and should not be, applied when the parties, by terms of the average agreement, had otherwise provided for a credit system for minimizing demurrage," is "unassailable."[2]

---

[1] See footnote 4 of the decision below, 640 F.2d 504, 506. See also Appendix A, p. A-4, to the Petition for Writ of Certiorari herein (hereinafter "the Petition").

[2] 640 F.2d at 506, 507; Appendix A to the Petition, p. A-4, A-5.

SUMMARY OF ARGUMENT

The Interstate Commerce Commission denied Monongahela's complaint seeking reparation of demurrage charges caused when cars were received containing frozen lading, on the grounds that the average agreement, in effect between Monongahela and B&O for over 30 years, provides an alternate basis for relief from demurrage charges caused by frozen lading.

The decision of the Circuit Court upholding this decision is based on the rationale expressed by the ICC and does not give undue deference to the decision of the agency. No important federal question is presented because the reasonableness of the average agreement has long been established, the interpretation given to it by the ICC has been consistently applied and is in accordance with established precedent, and the average agreement basis of computing charges provides an alternate method for relief from applicable charges which applies at the election of the shipper or consignee.

ARGUMENT

I. No Basis For Review Has Been Shown

Monongahela has assigned two well-known bases of review as error in the decision of the Court below. However, neither basis actually exists in this case.

A. The Court of Appeals Followed the Rationale Set Forth By the Agency.

First, Monongahela argues that the decision below rests on the *post-hoc* rationalizations of counsel rather than the stated rationale of the ICC.

The rationale of the ICC decision is set forth in the decision of Review Board No. 4 decided February 25,

1980.[3] There the ICC reviewed the tariff provisions which authorize relief to straight plan and average agreement shippers. It noted the contractual nature of the average agreement, the Commission's policy of encouraging contract rates, and the fact that a purpose of the average agreement is the offsetting of some demurrage caused by weather interference, frozen lading or car bunching. It cited other decisions of the ICC showing the establishment of a policy of denying further relief from charges accrued from such causes when the average agreement basis has been used for the settlement of demurrage charges. It thus concluded that the average agreement barred further relief and that in doing so it was not inequitable.

The decision of the Court of Appeals was based squarely on this rationale. The Court noted the existence of the average agreement between the parties and that its principal purpose was the spreading of demurrage liabilities over all shipments. It acknowledged the policy of the ICC that liability for demurrage charges would not be excused, even where freedom from fault could be shown, where the parties through the average agreement had otherwise provided for a credit system of minimizing demurrage charges. It noted that this policy of refusing to allow a shipper or consignee the advantages of straight demurrage and the average agreement while excusing it from the disadvantages of either had been consistently

[3] See Appendix B to the Petition. The decision of the Review Board, acting in an appellate capacity, is final agency action, subject to discretionary review by the ICC. Monongahela filed a petition for administrative review, which was denied by order of the full Commission, dated June 30, 1980.

applied by the ICC.[4] And finally, it noted that this case did not present a case of tariff interpretation.

Monongahela argues that there is a difference between the finding of the ICC that frozen lading is provided for in the average agreement contract and cannot be subsequently raised, and the court's finding that shippers should not be relieved from demurrage liability as a result of frozen lading when the parties have otherwise provided in the average agreement for the minimizing of demurrage charges. But of course this is the same finding, stated differently. In short, there is no substantive difference in the findings or rationale of the agency and the court.

Monongahela cites *du Pont de Nemours & Co. v. Train*, 541 F.2d 1018, 1026 (4th Cir. 1976), *rev'd in part on other grounds*, 430 U.S. 112 (1977) for the proposition that agency action must be sustained on the basis relied on by the agency itself, and not on the *post-hoc* rationalizations of counsel.

This is the same proposition which was stated in *S.E.C. v. Cherney Corp.*, 332 U.S. 194 (1947), which noted

> that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. . . .
>
> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court

[4] The Court cited a number of ICC cases demonstrating the consistent exercise of this policy, some of which had been decided subsequent to the agency decision in this case. But this does not indicate a deviation from the rationale of the ICC or a *post-hoc* rationalization.

> be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 511.
>
> 332 U.S. 194, at 196-197.

However, while a decision must be understandable, it need not be a model of clarity. A decision will be found adequate if "the path which it followed can be discerned," and if its findings are not "so vague and obscure as to make . . . judicial review . . . a perfunctory process." *Colorado Interstate Gas Co. v. F. P. C.*, 324 U.S. 581, 595 (1945). See also *Bowman Trans. v. Arkansas-Best Freight*, 419 U.S. 281 (1974).

The decision of the agency below in the instant case clearly met these criteria, and the decision of the Circuit Court correctly followed the rationale of the agency.

B. Proper Deference Was Given to the Agency Decision.

The second error alleged by Monongahela is that the Court of Appeals gave undue deference to agency expertise and affirmed a decision not having a rational basis. This argument seems to be based on allegations that, considering only the demurrage charges at issue here, the average agreement cannot provide for complete elimination of demurrage charges, and that therefore the bargained-for relief is inadequate and fails of its purpose. But it has never been maintained that the average agreement will provide relief which is an exact mirror of the relief available under the straight plan. On the contrary, the average agreement provides substantial relief in the ordinary course of business where no relief is available to a straight plan shipper in the same circumstances. Monongahela has had available the benefits of the average

agreement for over 30 years. It is of no significance that, during the three-month period in question, it might have been entitled to greater relief had it been operating under the straight plan. As stated by the Circuit Court, the Commission simply "determined not to allow a shipper the advantages of both straight demurrage and average agreement demurrage, while excusing it from the corresponding disadvantages of either."[5]

Monongahela, having enjoyed the advantages of the average agreement for over 30 years, now wishes to obtain the advantages of the straight plan, where, in the particular circumstances involved, they are perceived to be more advantageous. The Commission's decision to forbid the dual enjoyment of the advantages of these alternative plans is clearly rational.

The scope of review of agency action in a matter requiring discretionary relief is narrow, and the decision of the agency is entitled to considerable deference. *Consolo v. F.M.C.*, 383 U.S. 607, 620-621 (1966); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Bowman Trans. v. Arkansas-Best Freight, supra; S.E.C. v. Cherney Corp., supra.* Here the agency decision had a clearly rational basis and the Circuit Court did not err in affirming it.

II. No Important Question of Federal Law Is Presented

As noted above in the Statement of the Case, the average agreement basis of computing demurrage charges has been available as an alternate means of computing demurrage charges since the adoption of the Uniform Demurrage Code in 1909. The average agreement basis has consistently been found reasonable. See *Pennsylvania R. Co. v. Kittaning I. & S. Mfg. Co., supra; Swift & Co.*

[5] 640 F.2d at 507; Appendix A to the Petition, p. A-5.

v. Hocking Valley R. Co., supra; Increased Demurrage Charges, 1956, supra; Oliver Mfg. Supply Co. v. Reading Co., 297 I.C.C. 654 (1956); *Southern California Minerals Co. v. Union Pac. R. Co.*, 263 I.C.C. 659 (1945); *Davis Sewing Machine Co. v. Pittsburgh, C., C., & St. L. RR. Co.*, 51 I.C.C. 191 (1918); *In Re Demurrage Investigation, supra.*

Also, as found by the Circuit Court below, the ICC has consistently applied its policy of denying additional relief when charges have been computed in accordance with the average agreement.

Monongahela argues that this policy may penalize average agreement shippers under some circumstances for detention which is beyond their control. However, the average agreement provides relief in other circumstances which offsets such penalties. The Commission's policy is only that, when the shipper elects one or the other plan for the calculation of charges, it is bound to take that plan in its entirety, and cannot pick and choose the advantages of both plans whenever in any circumstance one may provide a greater benefit than the other.

The key fact, overlooked by Monongahela, is that the average agreement is a concession to the shipper, and it provides a specific basis for obtaining relief from applicable demurrage charges. It applies at the sole election of the shipper or consignee, and it may be cancelled at any time by the giving of 30 days' notice.

The law governing the average agreement basis of settling demurrage charges is well-settled. The fact that Monongahela and other shippers, who have long enjoyed its benefits, may now be dissatisfied because they have incurred demurrage charges in a particular circumstance under the average agreement, does not create an important question requiring determination by this Court.

CONCLUSION

There is no error in the decision below, and no reason for review by this Court has been set forth by the petition. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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